



SOUTHEASTERN LEGAL FOUNDATION, INC.

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December 22, 2016

VIA CERTIFIED MAIL

No. 7003 2260 0005 4600 7440

RETURN RECEIPT REQUESTED

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460

RE: Freedom of Information Act Request

Dear Sir or Madam:

Southeastern Legal Foundation (SLF) is one of the country's leading non-profit public interest law firms and policy centers. Now in its 40th year, SLF undertakes research on policy issues of interest to the general public. Currently, SLF is engaged in an inquiry into the Environmental Protection Agency's (EPA) decision-making process and handling of Title VI complaints.

According to the U.S. Commission on Civil Rights report titled *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* released in September 2016, the EPA received 33 Title VI complaints in 2015, and approximately 35 Title VI complaints in 2016 as of the date of the report. On October 21, 2016, we requested all 33 Title VI complaints received by the EPA in 2015 and any records related to the disposition of those 33 complaints, as well as all 35 Title VI complaints received by the EPA between January and September 2016 and any records related to the disposition of those complaints. That request was made as an effort to supplement EPA's online table referencing all Title VI complaints received by the EPA between 1993 and 2014, and providing links to selective supporting documents. As of the date of this request, for reasons unknown to the public, the aforementioned table detailing all complaints from 1993 to 2014 has been completely removed from the EPA's website. Accordingly, this request follows.

Request:

1. According to the U.S. Commission on Civil Rights report titled *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* released in September 2016, the EPA received approximately 290 Title VI complaints from 1993 to 2014. The Commission relied upon the now missing table in its report.

We are requesting the table previously available online listing Title VI complaints received by the EPA from 1993 to 2014. We are not requesting the accompanying documents related to the disposition of those complaints, some of which were linked in the table. We request only the table, which was previously available online at <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>.

Format of Production:

Pursuant to 5 U.S.C. § 552(a)(3)(B), SLF requests that the EPA produce the responsive records electronically. Please email any and all responsive records to kherrmann@southeasternlegal.org.

SLF is willing to receive responsive records on a rolling basis, if needed, to expedite the EPA's response. If this is not possible, we would appreciate you letting us know at your earliest convenience, with an explanation of the reason for delay.

Expedited Processing:

This is a request for expedited processing of records made pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(E). As described herein, there is a compelling need to expedite SLF's FOIA request because there is "[a]n urgency to inform the public about an actual or alleged Federal government activity" and SLF is "primarily engaged in disseminating information to the public." *See* 40 C.F.R. § 2.104(e)(1)(ii) (setting forth the requirements for expedited processing).

The requested records were publicly available until SLF requested related records and the EPA failed to meet its statutory deadlines to produce those responsive records. SLF is concerned with the accessibility of the requested records in the future given the agency's impending staff turnover at the outset of a new administration and the volatile state of the EPA's website at this time.

On December 16, we viewed the requested table on the EPA website at the URL address noted above. On December 20, when we referred back to EPA's website, it displayed a "restricted" error, and the EPA had removed the table from public view. On the morning of December 21, the webpage displayed the same "restricted" error; however, after email communication with EPA officials regarding a prior related FOIA request, EPA entirely removed the table, and the webpage now reads "The table 'Complaints Filed with EPA under Title VI of the Civil Rights Act of 1964' which provided information through 2014 is no longer updated or maintained; thus, the table has been removed from the EPA's website."

As noted above, we have been in contact with EPA officials regarding the October 21, 2016 FOIA request regarding the 2015 and 2016 Title VI complaints in an effort to seek more information and greater transparency. In real time with those conversations, the EPA removed the

table, lessening transparency. Accordingly, pursuant to 40 C.F.R. § 2.104(e)(1)(ii), the “urgency to inform the public about an actual . . . Federal government activity . . .” cannot be overstated.

Indeed, SLF’s activities qualify it under § 2.104(e)(1)(ii) as “a person primarily engaged in disseminating information to the public.” This need not be SLF’s “sole occupation,” § 2.104(3)(3), but SLF’s “primary professional activity or occupation” certainly qualifies as “information dissemination.” *Id.* In its 40 year history, SLF has worked and continues to work to bring issues of legal significance to the public’s attention through an extensive record of broadcast media appearances on nationally syndicated talk radio and cable television news, op-eds in print and online publications, as well as primary outreach through its websites and extensive direct mail efforts. Therefore, all requirements for expedited processing under both 40 C.F.R. 2.104(e) and 5 U.S.C. § 552(a)(6)(e) are satisfied.

Request for Fee Waiver

This is a request for records made pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Accordingly, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) we request that the records be furnished without charge, or at reduced charge. While a court is ultimately not required to defer to an agency’s interpretation of the FOIA, in anticipation of a request for additional information from the EPA, we have organized our fee waiver justification to coincide with the six factors outlined by the EPA at 40 CFR 2.107(l)(2)(i-iv) and (3)(i)-(ii).

Disclosure is in the public interest.

The first factor is satisfied because the subject of the request concerns identifiable operations or activities of the EPA. “[T]he phrase ‘operations and activities’ should be broadly construed.” 132 Cong. Rec. S16496 (Oct. 15, 1986) (Sen. Leahy). The EPA received approximately 290 Title VI complaints between 1993 and 2014, and has stated that it received another 33 in 2015 and approximately 35 as of September 2016. Pursuant to the EPA’s regulations, the EPA has the authority to withdraw or threaten to withdraw financial assistance in an attempt to force a recipient of federal funds to come into compliance with the EPA’s Title VI nondiscrimination mandates. 40 C.F.R. § 7.130. As such, the procedures and processes relating to Title VI complaints filed with the EPA include many identifiable agency operations and activities. The EPA’s regulations set forth a detailed process for how those claiming discrimination by recipients of EPA financial assistance can report said alleged discrimination and how the EPA must respond to such allegations. *See generally* 40 C.F.R. § 7 *et seq.* Those operations and activities include but are not limited to, receiving complaints, processing complaints, conducting investigations, holding hearings, making referrals to other agencies, and terminating federal funding.

The second factor is satisfied because the requested records have significant informative value into the operations and activities of the EPA and are thus, “likely to contribute” in a meaningful way to public understanding of EPA’s operations and activities previously identified. The EPA previously published a table detailing the approximately 290 Title VI complaints it

received between 1993 and 2014 at the web address <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>. It further published certain records relating to Title VI complaints EPA received between 2006 and 2014. For reasons unknown to SLF, the EPA declined to publish any records related to Title VI complaints received in 2015 and 2016. As such, on October 21, 2016, SLF submitted a FOIA request to the EPA requesting the complaint and disposition records related to all Title VI complaints received by the EPA in 2015 and 2016. As of December 16, 2016, the aforementioned webpage was active. However, sometime between December 16 and December 20, the EPA removed the webpage or restricted its access. And sometime on December 21, the EPA updated the webpage stating that the table “is no longer updated or maintained” and “thus, the table has been removed from EPA’s website.” The public can no longer easily access the table, which is an agency record. The reverse course in transparency, with no notice to the public, is unacceptable and contradicts President Obama’s stated commitment to transparency.¹ The requested records provide insight into the EPA’s decision-making process regarding Title VI complaints received. Given that the EPA did make public but then removed the table and related information regarding Title VI complaints received since the program’s infancy in 1993, the records requested will contribute significantly to the public’s understanding.

The third factor is satisfied because the requested records will contribute to “public understanding” because SLF will disseminate the requested information to the largest audience possible by disseminating it through the following various mediums: 1) its publicly available website (www.southeasternlegal.org) and ancillary website (www.epalawsuit.org) which combined receive nearly one million hits per year; 2) its regular mailings (averaging one mailing per week for a total of approximately three million per year) to interested parties providing educational information on the operations and activities of the EPA; 3) its bi-annual or quarterly newsletters to interested parties, totaling approximately ten to twenty thousand per year, also providing educational information on the operations and activities of the EPA; 4) regular spots on a wide-variety of radio programs; 5) spots on television programs; 6) frequent op-eds that run in national newspapers; 7) legislative testimony; 8) participation in legal and policy panels; 9) SLF’s blog – Freedom Speaks! which is prominently displayed on SLF’s primary website; 10) SLF’s Facebook page; and, 11) SLF events such as Celebrate America®. SLF’s eleven methods of dissemination, combined with its 40-year reputation as one of the nation’s leading constitutional public interest law firms and policy centers, supports granting SLF’s fee waiver request.

The fourth factor is satisfied because the requested records will “significantly” contribute to public understanding of the Title VI complaints received by the EPA from 1993 to 2014, how the EPA handled those complaints and the resolution, if any, of those complaints. SLF acknowledges that certain aspects of these complaints may be publicly available, but only in the “grossest sense.” See *Forest Guardians v. DOI*, 416 F.3d 1173 (10th Cir. 2005) (noting that

¹ The President himself has stressed the importance of the FOIA and governmental transparency: “In our democracy, the FOIA, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability *is in the interest of the Government and citizenry alike*.” Memo of Jan. 21, 2009, 74 Fed. Reg. Vol. 15 (Jan. 26, 2009) (emphasis added).

piecemeal records available through court filings throughout the country, various websites, and a wide-variety of newspapers throughout the country does not make information “publicly available”). The records have the potential to reveal information that is not publicly available in any meaningful way regarding the operations of the EPA and its procedures and processes regarding Title VI complaints – complaints that no doubt have a significant impact on the EPA’s decision-making process, especially given that the records were once readily available to the public but are no longer.

No commercial interest

Disclosure of the requested records is not in the commercial interest of SLF for the following reasons. SLF has absolutely no commercial or financial interest in the requested information, and would receive no pecuniary benefit from the information sought. SLF is a non-profit public interest law firm and policy center specializing in the practice of constitutional law. SLF also undertakes research on policy issues of interest to the public, such as environmental justice, the undertakings of EPA, and the EPA’s decision-making process.

If you deny all or any part of this request, please cite each specific exemption you think justifies your withholding of information, including notification of appeal procedures available under the law. If you have any questions about handling this request, you may reach me at the telephone number listed below.

Thank you in advance for your prompt attention to this request.

Sincerely,


Kimberly S. Hermann (w/permission KJA)
General Counsel
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